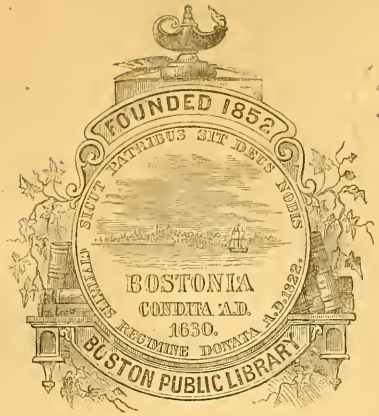

PAMPHLETS.

Historical Addresses.

AN

ADDRESS

DELIVERED AT CONCORD,

BEFORE THE

NEW-HAMPSHIRE HISTORICAL SOCIETY,

AT THEIR ANNUAL MEETING,

JUNE 8, 1831.

BY CHARLES H. ATHERTON,

A MEMBER OF THE SOCIETY.

CONCORD:
PRINTED BY JACOB B. MOORE.
1831.

ADDRESS.

Mr. President, and
Gentlemen of the Historical Society,

I APPEAR at your request to discharge a duty, which no member of the Society should feel himself at liberty to decline—the duty of not withholding our efforts, however individually humble they may be, towards illustrating the natural, civil, literary or ecclesiastical history of our State, and by that means to manifest our approval, at least, of the important and praiseworthy purposes of its Historical Society. You cannot however be insensible that New-Hampshire is peculiarly fortunate in her Historian. All the topics, that come within the scope of general history, have been treated with a diligence of research, a minuteness and accuracy of detail, a perspicuity, elegance and impartiality, that ought ever to endear to the people of this State the name of BELKNAP. And it is a subject of sincere congratulation, that by a new edition of his work now coming from the press, under the auspices of a most deserving member of our Society, it may, as it should, find a place on the shelf of every family library in the State. Rash and fruitless would be the attempt, to enter and glean in any part of the field which Belknap has reapt.

I propose therefore to occupy a short period of your leisure, irksomely, I fear, to my audience, upon a subject too frequently passed over by the historian with a neglectful silence,—a subject never-

theless, in my apprehension, most intimately connected with the moral condition, the social harmony, the comfort, prosperity and happiness of a community. I refer to the tenure by which real estate is holden, and those laws and the administration of them, by which the soil constituting the territory of a State, however subdivided among its citizens, with their money and personal effects, however vast in amount or diversified in kind, are transmitted from one generation to another under the title of heirs, devisees, or creditors. Our subject has little to do with the heroic achievements of a State, with the magnificence of its public works, or the celebrity of its literature. It has little concern with that external grandeur of a people, which, while it dazzles the eyes of mankind, too often, like the whited sepulchre, serves only to conceal the poverty and rottenness within. But if the question be as to the real soundness of a community; if the question be as to the aggregate of the comforts and enjoyments of the individuals who compose it, then has our subject a near relation to its freedom and happiness. With less invention than is often employed by the historian, the government, spirit and condition of a people may be described from a knowledge only of their statutes of descent and distribution. By these we are led into the interior of the mansion, in order to judge of its accommodations and the comforts of its inmates, instead of forming our estimate of them by an outside view.

This succession of the living to the property and rights of the dying by uniform rules, it should be recollected, is the creature of positive law; and while it has proved the most difficult, it is at the same time among the greatest and most beneficent achievements of civilized man. Taking the usual estimate of time for one generation, it follows that in every thirty-four years, the whole amount of

every thing among men and upon the earth, wherein right and property can be claimed by the myriads of human beings that are placed upon it, undergoes this transfer. And if a country can be found, where this immense operation is carried on by laws founded on the broad basis of expediency and justice, adequate to all the exigencies that can happen, so that nothing is left without a rightful proprietor, securing and protecting alike the rights of all, the strong and the weak, the adult and the infant, even though it may not yet have seen the light; if, I say, a community can be found, where this intricate and wonderful operation is continually going on, and almost unobserved, because it is without waste, without fraud, without litigation and nearly without expense, we need go no further for proof of the wisdom of its legislation; we need make no other appeal to satisfy us of the intelligence and moral condition of such a people.

Indulging the belief that the object of legislation in this important branch of civil polity was never more nearly attained than it is in this State, can it be without its interest, may we not even find it useful, to contemplate the origin, and trace the progress of those principles and views which from time to time have been recognized and sanctioned by the legislative power, and are now embodied into a system commonly known as our Probate Law?

At the time of the emigration of our ancestors, the feudal system pervaded Europe. A more gigantic or cunningly devised engine to make lords of the few and vassals of the many could not be imagined. Indeed this was the heart and life blood of it. All grants of territory in the western hemisphere by the European sovereigns, had hitherto been made to the adventurers, as their vassals, upon the principles of this system. But most fortunately for mankind, there still remained in Eng-

land some vestiges of liberty and of the freedom of the Saxon institutions. In the county of Kent in particular, the tenure of free and common soccage had been preserved. The peculiarities of this tenure were, that the duties of the holder to his superior were limited and certain, and might be only that of allegiance to the sovereign which belongs to our fee simple estates. It was devisable by will, and not forfeited by crime. Although, as an inheritance, it was generally subject to the rule of primogeniture in the male line according to what then was, and now is the English common law, it nevertheless admitted of various modifications by custom, among which were found what is called gavelkind, or an equal distribution among all the male children. This tenure survived the general wreck of Saxon liberty. It resisted the torrent of the Norman invasion, and stood like a beacon amidst the surrounding desolation, to rally the lovers of freedom in a future age. In the fermentations of the spirit of liberty in England, efforts had often been made to resolve the feudal tenures into that of free and common soccage, as the most free and desirable of all. These efforts were unsuccessful until their operation was generally suspended during the usurpation of the Parliament and of Cromwell, and they were finally abolished by law on the restoration of Charles II., in 1660. But this was forty or fifty years after the colonization of New-England.

It was however among the whims of that whimsical monarch, James I., in 1620, when he issued his patent to the council established at Plymouth, in the county of Devon, for the planting, ruling, ordering and governing New-England in America, that he, of his own mere motion and certain knowledge, was pleased to make the grant to them, their successors and assigns, to be holden of him and his successors, as of his manor of East Green-

wich in the county of Kent, in free and common soccage and not in capite or by knight-service, reserving in full of all other duties, demands and services, one fifth of all the ores of gold and silver. This reservation amounted to nothing, so that in fact, the grant constituted what we now understand by an absolute estate in fee simple for allegiance only. This was the parent stock of all the grants in New-England. We shall soon see how the puritans understood,or affected to understand, this tenure by free and common soccage, and how they moulded it to their own views.

The fact here furnished is among the most important in our civil and political history. All vassalage was excluded. Every man became the absolute proprietor and lord of his own fee. Under God, it was the fostering nurse of that spirit of independence, that self respect, that consciousness of possessing all the rights that belong to a man, equal to the rights of any other man, and that rising of indignation in the bosom at every thing like oppression, by which the yeomanry of this country are so peculiarly distinguished. It is the parent also of our system of general education, for these peers or equals claimed an equal share in its advantages for themselves and their children.

It is impossible to say with much precision what a different impress of character, a different tenure and distribution of landed property might have communicated to the people, that spread themselves over the United States ; but no one can doubt, that our destiny would have been less cheering to the friends of civil and religious liberty. We might not have been, as we now are,an example to the world of the peaceful enjoyment of equal rights, or the teachers to mankind of the difficult lesson of self government.

So utterly opposed were our puritan ancestors to the feudal burdens, as if to make certainty more

sure, in 1641, the great and general court of Massachusetts ordered and declared that all lands and heritages shall be free from all fines and licenses upon alienations, and from all heriots, wardships, liveries, primer seisin, year and day waste, escheats and forfeitures upon the death of parents or ancestors, natural, unnatural, casual or judicial, and that forever."

No records remain to inform us by what rules, in the first years of the colonies of New-Plymouth and Massachusetts, the estates of persons deceased were distributed, but there is no reason to doubt that the governor and assistants in both colonies, and sometimes the whole general court acted as a court of Probate, and distributed estates, not according to any uniform rule established among themselves, or by any rules established in England. What strikes us with amazement is, that in the first dawnings of their legislation they break down all the leading distinctions prevailing in the mother country, and of which they cannot be ignorant, between real and personal estate, and place land very much upon the same footing with goods. When their county courts were established, the probate jurisdiction was given to them, with an appeal to the court of assistants. Distribution was made according to their views of the wants and merits of the family. The whole estate, both real and personal, was sometimes assigned to the widow or the administrator, or some relation who would undertake to support the widow and provide for the children. Lands were made equally liable with goods for all debts, giving no preference to bond or judgment debts over those by simple contract, and making no distinction in favor of those debts, where the ancestor by seal had bound his heir. When the estate was insolvent, application was made to the general court, who took measures to ascertain the

estate and the debts, and to have them satisfied in a ratable proportion. Both real and personal property was set off to creditors by appraisement.

Now nothing could be more inconsistent with English law, than these proceedings of the Puritans, who have been said, and I think too unguardedly, to have brought with them the laws of England.

Nothing could be more loose and informal than their probate proceedings. The same looseness also prevailed in their conveyances of land; for by a law of the Massachusetts Colony, in 1651, which was twenty years after their settlement, we find the legislature enacting, that no deed of land, intending to convey an estate of inheritance, shall be valid for that purpose, unless the word heirs is used; providing, however, that this law should not operate against former conveyances.

The people of both Colonies grew dissatisfied with the wide discretion exercised by their county courts, in disposing of the estates of persons deceased, and called for some more uniform rule. The colony of Plymouth, somewhere between the years 1633 and 1636, established their law of descent. They recognize the free tenure of East Greenwich, in the county of Kent, as that by which they held their lands, and they adopt the custom of gavelkind, that is, a descent to the males in exclusion of females, as if that were the general quality of free and common soccage, instead of primogeniture; with a proviso, however, that the eldest son shall have a double portion. This they do out of regard to the law of Moses, referring to Deuteronomy, xxi. 17. The personal estate, after bringing up small children, and setting aside a sum for the decrepit and helpless, the payment of debts and funeral charges, was to be equally divided among all the children, saving to the eldest son a double portion, unless the lands

assigned him should amount to a double portion of the whole estate.

It has been brought as a reproach against the Plymouth colony, that they gave to the daughters no share in the real estate. This reproach is unjust, and comes from those who are not sufficiently acquainted with their legislation. They had a very prompt and effectual method of providing for them. Their county courts were authorized to apportion the daughters, as should be just and reasonable, out of the estate of the heir or heirs male, and to issue execution therefor. Thus did this pious,kind hearted and chivalrous people satisfy their own views of justice; pay due deference, as they supposed, to the law of their tenure and the still higher authority, in their estimation, of the laws of Israel.

About 1641, her younger but more powerful, as well as more stern and arrogant sister, the Colony of Massachusetts, began to approach the subject of distribution by legislative enactments. The county courts of the jurisdiction where the intestate had his last residence were authorized to assign to the widow such part of the estate as they should judge just and reasonable, and to assign to the children and other heirs their several parts and portions, providing that the eldest son shall have a double portion, and where there were no sons, the daughters to inherit as coparceners, unless the court, upon just cause alleged, should otherwise determine. They had before, in their fundamentals, laid down the general rule in the following words: "Estates shall descend to the next of kin according to the law of God."

We see here that the discretion of the court must, in a considerable degree, have constituted the law of the land; but real and personal estate were placed under the same rules of distribution, and the equal rights of all the children in both

species of property acknowledged, with the exception of a double portion to the eldest son. From time to time the laws assume a more definite character, as the exigency of the people required. It is impossible, however, in many cases to fix the dates of their various enactments. For in the several revisions of the laws, both of Plymouth and Massachusetts, the old laws were brought forward and incorporated with alterations into the new, without their original dates, or with such confusion of dates, as to leave it very much a matter of conjecture.

The committee of the legislature of Massachusetts, appointed in 1812, to collect and publish the laws of the colony and province, which had become scarce and difficult to be found, were not able to remedy this inconvenience. It is very much to be regretted, also, that their authority did not extend to the colony laws of Plymouth. Considering that Plymouth, before she was incorporated with Massachusetts by the province charter of William and Mary, in 1691, had been a colony for eighty years, equally independent, wise and peculiar in its legislation; that she brought to that province a most interesting and valuable territory, then divided into three counties and twenty towns, with a population estimated at thirteen thousand souls, it is somewhat surprising that her laws should not have been thought worthy of being collected and published. As matter for history they are surely as interesting, and have as much bearing on land titles within the territory to which they applied, and would be as explanatory of subsequent and existing laws, as the colony laws of Massachusetts. It seems to me that this strange neglect can be accounted for only upon the entertained belief that those laws did not exist, or could not be found. Hutchinson, in his history, had said that Plymouth had never

established any distinct code or body of laws. Francis Baylies, Esq. the recent meritorious and indefatigable historian of that colony, fully proves Hutchinson's mistake. He admits, however, that there is not a single printed copy of their laws now extant. It gives me pleasure to be able to say that this is also an error. In the Boston Athenæum there is a copy of the Plymouth colony laws, printed by Samuel Green, in 1685, by order of the general court of New-Plymouth, held at Plymouth June 2, 1685. It forms the latter part of a volume in which are bound the colony laws of Massachusetts printed by Benjamin Harris in 1692.

It must be acknowledged, however, that there was a great affinity and correspondence in the legislation of the two colonies, and that Massachusetts generally took the lead. For although the pilgrims had settled at Plymouth ten years before the arrival of the Massachusetts colonists, as they had no charter for government, they relied principally on their voluntary association and their church government for order, until twelve or sixteen years after their landing, whereas the Massachusetts colony brought with them a charter for government, and began to put forth their principles and pass ordinances the next year after their arrival, that is, in 1631. There was nearly the same correspondence in the legislation of Plymouth and Massachusetts before their union as there was in that of Massachusetts and New-Hampshire after our separation.

It will be recollected that in 1641, the settlements in New-Hampshire voluntarily came under the jurisdiction of Massachusetts; that this union was cordial and satisfactory, and that it continued to the year 1680. It was then broken by the authority of the king, and renewed subsequently for a short period after the deposition of Andros

until 1692, when a new executive was appointed by the crown for the province of New-Hampshire, and almost contemporaneously the colonies of Massachusetts and Plymouth, and the District of Maine were by the charter of William and Mary united into one royal province. The above facts are recited for the purpose of observing, that by our early and long continued union with the colony of Massachusetts, we were assimilated to her views, feelings, and principles. Most of our towns were settled from that prolific hive of the new world. We became flesh of her flesh and bone of her bone. Her laws were our laws, and after our separation, they continued so either by a legislative acknowledgment of their authority, or by re-enactment, and even down to the present time, there are no two states in the Union, whose manners, customs, habits, principles, laws and institutions bear so strong a resemblance to each other, except perhaps Maine and Massachusetts, which till a recent period were united.

Under the colony laws, as we have already noticed, real estate was distributable in the same manner as personal, the creditor taking therein the whole estate of the debtor. But while they boldly made this inroad upon the law of real property, they left estates tail to be regulated by the rules of the English common law. Primogeniture was here preserved in the male line. The heir could not be divested by the tenant in tail, or by his creditor, until after the entailment had been barred by the fictitious process of a common recovery. This condition of entailed estates furnished a singular anomaly to their general system of laws. The state of Massachusetts in 1792, applied a remedy by authorizing the tenant to bar the entail by his own conveyance, and by giving the same effect to the levy of an execution by a creditor. If the law of England is now in this state the law

in relation to entailed estates, as I apprehend there is no doubt but it is, the subject is certainly deserving the early attention of the legislature. On examination I think it will be found that our statute for the levy of executions on real estate will not divest either the remainder man or the heir of the tenant.

Under the colony laws, also, the county court as a court of probate was authorized to ascertain the debts against insolvent estates, by means of commissioners, and to order payment in a ratable proportion; to make the widow an allowance, out of the personal estate, of such articles as were exempt from attachment; to set off to her use one third part of the real estate; to order the sale of real estate for the payment of debts, and also in performance of the contract of the deceased; to appoint guardians to minors and persons non compos; to decree the payment of legacies and distributive shares, with the singular power of issuing executions to carry their decrees into effect.

By the statute of the 22d and 23d of Charles II. in 1670, it was made imperative on the courts of probate in England to take security of administrators, and the rules for the distribution of the personal estate of an intestate were more accurately defined. This law was soon followed in the provinces here, and applied to real estate as well as personal, with the favorite exception among the puritans of a double portion to the eldest son. This law now constitutes the grand basis of our law descent and distribution. Here also we find the confirmation of the common law right of the widow to one third, and under some circumstances, to one half of the personal estate as her distributive share.

At the time of the emigration of our ancestors, it was within the discretion of the ordinary to require bonds of an administrator to return an in-

ventory and to account, because the administrator was his substitute in the particular case. But from executors who were the agents of the testator, and of course having his personal confidence, it was thought as improper to require security after his death, as it would be to require it of the testator when living. He had not required his executor to give security, why should the probate court ? The means here of compelling executors to perform their duties were not at hand as they were in England, and it became a most embarrassing subject. We now look back with surprise to see with how much difficulty this prejudice in favor of executors was at last overcome. Various enactments were made to prevent executors from defrauding creditors and legatees. As late as 1714, we find by the provincial laws that executors were to return an inventory, or to give bonds to pay the debts and legacies, with a proviso that no bonds should be given, where there were residuary legatees; but in that case the executor should account. The reason is very plain that without an account, the residuary legatees had no means of ascertaining their shares. Strange as it may appear, the legislature of this State did not make the very useful and what seems to us, the very obvious and simple enactment requiring the executors to give bond to return an inventory and to account, until the 3d of Febuary 1789. And to the honor of New Hampshire be it said, that on the same day by her statute for the distribution of intestate estates then passed, she adopted the christian principle of equality and rejected the mosaical institution of the double share to the eldest son, which up to that period had been the law of the people of this State. In June of the same year the Commonwealth of Massachusetts followed New Hampshire in making the same important change in their law of descent.

In 1718, a great advance was made in the probate law here, by authorizing the judge of probate for the province to license executors and administrators to make sale of so much of the real estate, as should be necessary to pay the debts and legacies. It was not until a century afterwards that Massachusetts gave to her judges of probate the same authority. This power was there very incommodiously vested in their supreme court and court of common pleas.

During the colonial independence of Massachusetts, for such it was, while their government was wholly popular, the executive, legislative and judicial officers, being elected by the suffrages of the freemen, as they were during our union with her, the county courts were the courts of probate, with the right in the suitors to appeal to the court of assistants, and from them to the general court. In England the probate jurisdiction was ecclesiastical in its character. This originated in the supposed connexion, inculcated by the clergy in an ignorant age, between the welfare of the soul and the pious disposition of the effects of the deceased. The soul itself was considered as a proper subject of bequest, which the clergy had power to carry into effect. Traces of this superstition are even now to be found in the formal part of many of our wills. It may seem somewhat strange, considering the theocratic principles of government which prevailed in the colonies of Maschusetts and Plymouth, connected with all they had ever known of the administration of probate law in England, that it should here be made by them an affair of civil jurisdiction. But such a distinction in the puritan clergy was irreconcilable with some of their leading ecclesiastical principles. They dreaded hierarchy. The independence and equality of the churches and of the clergy were among their fundamentals. They were satisfied with

that influence by which the civil polity of the colonies was moulded to their views of a godly government. By means of this, no man could be a freeman or vote, unless he were a church member. No one could hold an office or be a deputy until he received the church stamp of orthodoxy. It was from the pulpit that the laws took their origin, and the government has been well enough designated "as a speaking aristocracy in the face of a silent democracy."

It should not be forgotten, however, that so desirous was Massachusetts to explain her charter by her jurisdiction, she did not require our people to take upon themselves the yoke of her orthodoxy. Her religious scruples here yielded to her policy, and most fortunately; for had she insisted upon this as the condition of our union with her, abandoned as we were by the Masonian proprietor, destitute and desirous as we were of a government, it is very questionable, whether we should not have replied to her, in the language of William Blackstone, who was the first English inhabitant of Shawmut, a place better known of late years by the name of Boston. When solicited by the Massachusetts colonists to remain and unite with them, his answer was, "I came from England because I did not like the *Lord Bishops*, but I cannot join with you, because I would not be under the *Lord Brethren*."

We are accustomed to look back to this period as the golden age of virtue and religion. I would not speak disparagingly of the piety, chivalry or learning of the few who impress upon history their own character and transmit it to future generations as the character of the age in which they live. But if it be just to estimate the virtue and religion of a country by the virtue and religion of the individuals that constitute the great mass of its population, I listen with an incredulous ear to

those who insist upon the comparative degeneracy of the present times. We undoubtedly have much less of what was then called religion, but that we have quite as much order, morality and virtue, cannot, I think, admit of a doubt. No person can examine their laws and judicial proceedings, and witness the number and severity of their penalties, and notice the offences, which from time to time, they were called upon to remedy by legislation, without being fully convinced, that as a community, they had their full share of fraud, violence, and crime of the deepest dye. When the population of the colony of Massachusetts could not have exceeded six thousand souls, in the year 1635, at the first court when a grand jury was used as the accusing power, there were one hundred indictments presented for trial, and this too, notwithstanding their statute of limitations, by which prosecutions were barred after the offence was two years old. Making all due allowance for the strictness of their criminal code and the petty offences then cognisable, this number will appear enormous. It is very much as if, in this county of Merrimack, at the next superior court, five hundred bills of indictment should be found; whereas the average number, it is presumed, does not exceed four for each semi-annual term. May we not therefore presume, that instead of retrograding, we have been making continual advancement in social order and virtue.

When the colonies became of sufficient importance to attract the attention and cupidity of the crown, possessing the power, it assumed the right to put forth new charters of government to appoint the executive authority. That executive, whether a president, governor, or lieutenant governor, exercised in probate matters the power of the ordinary in England, either personally or by a substitute called a judge of probate, but who was

merely his surrogate. Under this administration of the probate laws, appeals lay from these judges of probate to the governor or president and council. President Dudley, whose administration commenced in 1686, and who was to smooth the way for Andros, held a court of probate himself at Boston, and appointed judges and clerks of probate for remote counties, and for the provinces of New-Hampshire and Maine. Soon, however, Andros arrived with his commission as governor, and captain general of all New-England. He was the supreme ordinary of the whole territory, and had brought to him at Boston from the most remote parts, all the probate business. It is said, that in some instances, he appointed judges of probate with a limited jurisdiction. I have not been able to ascertain the fact with certainty, but I presume that no one was appointed by him for New-Hampshire.

The inconvenience to which he subjected the people in the transaction of their probate business, and the exorbitant fees exacted by him, were among the causes of the popular discontent by which he was deposed, and the old colony government for a short period resumed. It was this Sir Edmund Andros, however, who first introduced into New-England the forms for probate proceedings used in the ecclesiastical courts of the mother country. These forms have been here used ever since, and in some instances, until recently, without the alterations which changes in the laws not only made proper but essential.

From the probate records in the county of Rockingham, it appears that in 1699, William Partridge, Esq. Lt. Governor, appoints guardians and grants administrations for the province of New-Hampshire, and the records are certified by Charles Story, secretary. In 1703, Joseph Smith, who was then one of the council, officiates

as judge of probate for the province, and the records are certified by the same Charles Story, as secretary and register. It is believed that after this period, there is no instance of the governor's holding a probate court personally, but the duties were performed by his surrogate, under the name of the judge of probate. By the act of 1771, dividing the province into counties, the judges and registers of probate were to exercise their respective functions only in the counties to which they belonged, excepting that the counties of Strafford and Grafton, on account of their then paucity of inhabitants, were temporarily annexed to the county of Rockingham.

After the dissolution of the royal government, the temporary government then established by the people proceeded promptly to fill the vacated offices. On the 28th of June, 1776, under the enacting style of the council and house of representatives for the colony, they abolished the old court of appeals, and made the supreme court of judicature the supreme court of probate, with a wisdom that the people have never seen cause to question. This enactment was afterwards incorporated into our constitutional law, and has, no doubt, greatly contributed to the uniform administration of probate law in this state. It was not until the constitution of 1783, that a judge of probate was recognized as an independent and permanent officer, to be commissioned during good behaviour. By custom since that time the registers of probate have held their office by the same tenure. How this custom originated or on what principle it is founded I am unable to discern.

The leading features of our present system of probate law, are, *First.* The distribution of estates real and personal to the next of kin on the principles of the civil law, which considers the half

blood to be as near of kin as the whole blood. By a singular inconsistency with their general rule of descent, the Massachusetts colonists excluded the half blood. In England, after the statute of the 22d and 23d of Charles II. 1670, the succession of the half blood was admitted as to personal estate. The courts here soon followed in their decisions. But strange as it may appear, notwithstanding the rule of descent was the same in real as in personal estate, it was not settled in Massachusetts until 1760, that the half blood could collaterally inherit real estate, and in New-Hampshire, it has very lately been a subject of litigation before our superior court. The above general rule of descent is subject by our statute to certain exceptions, too well known to require enumeration here. The expediency and justice of one of these exceptions may well be doubted. I refer to the exclusion of the mother, as the heir to the share which her child has from its testate father. It would seem to be a very natural presumption, that if the father intended to limit the descent of what he gives to a child, that he would express that intention in the bequest.

Secondly. The liability of the real estate in default of the personal, for the payment of the expenses of administration, the funeral charges, the support of the children under seven years of age of an intestate, and the payment of debts and legacies, with authority in the courts of probate to license administrators and executors to make sale of the real estate for these purposes. *Thirdly.* The partition by the courts of probate of all real estate, there being no dispute about the title, where the parties in interest are by law entitled to occupy their shares in severalty. *Fourthly.* The distribution of insolvent estates among all the creditors in proportion to their respective claims, giving a preference only to the expenses of the last

sickness and taxes, and these preferences founded exclusively on considerations of humanity. *Fifthly.* The probate of wills, the granting of administrations, and the appointment of guardians to minors, persons non compos, and those spendthrifts and idlers who are likely to subject the town to expense for their support, with all the powers usually incident to these leading powers combined with the duty in the courts of probate to require and to take security from all persons who are in any way made by them, or by any testate act, the trustees of the rights and property of others. *Sixthly.* The executor is by law made the administrator also on all the estate, whether testate or not, and security is taken of him accordingly. *Seventhly.* The power in the courts of probate to license guardians to sell the real estate of their wards, whenever it shall be necessary for their support, or conducive to their interest. This is a very important part of the jurisdiction of the judges of probate, and was not exercised by them until authorised by the law of February, 1822; before which time it had resided in the superior court. To this must be added the power of authorising administrators and executors to convey real estate in pursuance of the written contract of the deceased, exercised also by the legislature till the year 1797, when it was first delegated to the courts of probate.

From this enumeration of the general subjects of jurisdiction appertaining to the judges of probate in this state, it will be perceived there has been a continual tendency in the laws to augment their labors and duties,—how beneficially to the state, may be inferred from the fact, that the vesting in them the power of authorising guardians to sell the real estate of their wards, compared with the former expense of itself, now makes an annual saving to the people of this state equal to the

whole amount allowed by law for the support of their courts of probate. This expense is four thousand eight hundred and forty-five dollars, for the pay of eight judges, and as many registers, to a population of two hundred and seventy thousand souls.

Taking the data from one county, and estimating that the probate business is in proportion to the population, the number of administrations granted in this State annually, cannot be less than six hundred and fifty, about one third of which are on testate estates; a greater number of guardianships, and an equal number of inventories and accounts rendered; three hundred and fifty licenses to sell real estate; two hundred and ten partitions of real estate; and one hundred and forty distributions of insolvent estates.

In addition to the great economy of this system in a public point of view, by which this great amount of business, with its various and almost innumerable appendages, is transacted, I have said it was in this state transacted also with such rare instances of fraud, waste, or litigation, as to speak volumes in favor of the wisdom of our laws, and the morality of our people.

From an experience of more than thirty years in the probate court for the county of Hillsborough, I am able to say, that during that time, only one instance of deliberate fraud and imposition has been detected or even suspected. Insolvent estates under administration, have paid an average of more than fifty per cent. During that period also, not more than seven appeals from the judge of probate have been prosecuted before the superior court, or less than one appeal for every four years. Only two of these were litigated before the judge of probate, and the major part of them were questions as to the sanity of the testator, where the parties wished a trial by jury. There

has not been occasion for prosecuting to judgment more than four suits on probate bonds, and in no instance has there been any failure of security. It is not doubted, that an exhibit from the other courts of probate in the state will furnish similar and very likely better evidence of the satisfactory and successful operation of our probate system.

It is a subject however, of no very cheering reflection, (I still speak from the records of a single county, not doubting that myremarks will apply in a greater or less degree to all the counties,) I say, it is a subject of no very cheering reflection, that, notwithstanding the number of administrations and inventories are now greater than at any former period, the average amount of the estates, and even their aggregate amount has diminished. This is mainly to be attributed to the depreciation in value of landed property ; and the cause of this depreciation is found in the establishment of new states, and the policy of the general government, by which immense quantities of land of superior productiveness are continually at low prices thrown into market. It is a principle of political economy as certain in its operation as any of the laws of nature itself, that the opening for cultivation of large tracts of soil of superior fertility, will reduce in value the soils of an inferior grade. And as there seems to be no assignable termination to this action of the general government, wisdom requires that we should be fully aware of its effects upon the people of this state, and not suffer ourselves to be deceived as to their true cause.

Notwithstanding that in morality, industry and activity, the citizens of this state are exceeded by no people on earth—notwithstanding the large proportion of its uncultivated lands and the comparative sparseness of its inhabitants, we have for the past ten years been but little more than able to keep up a stationary population. While the

increase of the United States has been between thirty and forty per cent., ours has fallen more than twenty per cent. below the general rate, being nearly ten per cent. less than that of our neighbors, Massachusetts and Vermont, and less than any other state in the union, Connecticut and Delaware excepted. These may be unwelcome truths, but do they not bring with them an equivalent of consolation and hope? If, as citizens of the state, we lament this depleting operation upon ourselves, owing to the general character of our soil, of the policy alluded to, as citizens of the union, we ought to rejoice, and we do rejoice; for we see in it the promotion of the general good. We see in it a wisdom, a patriotism, and a philanthrophy which looks to the expansion, the strength, the greatness, the happiness and the glory of that union, of which, we bless God that we are members. Every twenty-four hours adds to this union, a population equal to that of one of our well settled towns. Every year a population nearly double that of this state, and in the rapid lapse of that decade of years on which we have entered, the increase wi l be nearly equal to eighteen such states as our own. The thought is overwhelming; and if there be any thing this side the grave, which can impart value to human existence, and give us a just pride in our being, it is, that we are members of this great and growing community, where liberty and law, social order and self-government, education, virtue and religion and happiness, almost unmingled, go hand in hand, spread and expand with its astonishing increase of human life, and can feel ourselves associated with its past achievements, its present prosperity and its future glory.

And should the ever active intelligence of the nation ascertain that it will be wise in the people to diversify their industry and pursuits in accommodation to the increasing, multifarious, and in-

finitely varying wants of an improving and highly civilized state of society, and in accordance also with that diversity of taste and power, of age and sex, of constitutional and mental aptitude in the individuals with whom it has pleased the Almighty to people the world, and by this means to increase indefinitely the working members of the community, who, after supplying their own wants, shall, by the enlargement of their private means, be continually adding something to the surplus stock, and if especially it shall be ascertained that here lies the great secret, of national productiveness, and consequently of national wealth and national power, may we not indulge the hope that a policy which shall cherish and protect the *industry of the country* against foreign competition, may create a demand and a home market for the products of our soil that shall counteract its depreciation from other causes? That such would be the tendency of such a policy cannot be doubted. Whether however its efficacy will prove sufficient to raise or only to stop, or only to retard the downward progress in value of our landed estates, remains with the future to decide. But if this compensating policy, (compensating in some degree at least,) shall be withdrawn, and the disposition already manifested to open to cultivation more and more of the soils exuberant in fertility, at cheaper and cheaper rates, shall be followed up, it requires not the aid of prophecy to foretell, that the pressure upon those of us, who shall remain here, will be severe in the extreme.

Writers on population have estimated, that in every thirty years,the number of deaths in a country will equal the number of its inhabitants. This estimate is clearly too short for a climate possessing the salubrity of ours. Say then that in the coming fifty years, death will draw its pall over as many human beings in this state as now

occupy its surface. We have here the paradox of an ever dying, and at the same time an ever living community. It lives by those who come to take the places which we leave, and to succeed to and share what we have wrought out for them, whether of good or of evil. How important then to the legislator should appear the even handed justice, the precison and plainness of those rules, by which this succession and distribution is guarded and regulated. How important that they should be carried into effect with a care, and fidelity, and a uniformity, which shall exclude as far as possible every source of questionable right, and every inducement to fraud, litigation and violence, that whatever else we may leave to our survivors, a contentious spirit for the spoils of the dying may not be among our bequests. Pardon me then, if I urge upon you the duty of cherishing your courts of probate as important agents in our estimable system of civil polity, and the duty also of watching the operation, as well as the administration of our probate laws.

We have spoken of New-Hampshire at different periods, without sufficiently discriminating its real importance at the times of which we spake. What, for instance, may be supposed to have been its population in 1641, at the time of the union with Massachusetts, and when, on the division of that colony into counties in 1643, a county by the name of Norfolk was established, extending from the Merrimack to the Piscataqua, and of which Salisbury near Newburyport was the shire town? No reasonable calculation can assign to our territory at that period, a population exceeding one thousand souls. Yet our settlements had commenced on the Piscataqua twenty years before, and only three years after the landing of the Pilgrims at Plymouth. Portsmouth and Dover were however thought of sufficient importance, to have

a court approaching in jurisdiction to the county courts of Massachusetts, and the county was usually styled the county of Norfolk, including the county of Dover and Portsmouth. On our separation, this county of Norfolk was obliterated; and the towns on the Merrimack falling within the jurisdiction of Massachusetts were annexed to their county of Essex. This court of Dover and Portsmouth had a probate jurisdiction, whether limited or not, I have not been able to ascertain.

Again, at what may we estimate our population at the time when by the authority of the crown we were reluctantly and finally separated from Massachsetts in 1692? Not more than five thousand souls at most; and even this will shew an increase for the intervening period of fifty years, of about forty per cent. for every ten years. At the time of the division of the province into counties, in 1771, our population has been estimated to be from sixty-five to sixty-eight thousand. This will give an increase for the preceding eighty years, somewhat less than forty per cent. for every ten years. From this period to 1790, when our population is known to have been one hundred and forty-two thousand, the rate of increase was about forty-three per cent. for every ten years. This may appear extraordinary, considering that the war of the revolution occured within this period, but the division of the province into counties was attended and followed by an unusual influx of population. Massachusetts had been divided into counties more than a century and a quarter before. From 1790 to 1800 the rate of our increase was about thirty per cent.; from 1800 to 1810 about sixteen per cent.; from 1810 to 1820 about fourteen per cent.; and from thence to 1830 about ten per cent. The increase of the population of New-England from foreign sources ceased in 1640, about the time of our union with Massachusetts. From that period more

have gone from it than have come to it; and estimating that for the coming ten years the natural increase of our population in this state, will be thirty per cent. (probably it will be nearer forty per cent.) and that we shall be able to retain within our limits one third of that increase, it follows that in this short period, there will proceed from us fifty-four thousand souls to people, and we trust, to bless some other part of God's earth.

Gentlemen of the Historical Society:—Entertaining views as to the time when the common law of England became the common law of New-England, somewhat different from those usually expressed on this subject, it was originally my intention to have submitted those views to your indulgence, especially as they would be connected with facts highly illustrative of our civil history, and nearly allied to the subject which has particularly attracted my attention; but time would fail me, as well as your patience, upon which I fear I have unreasonably trespassed.